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alliance for its protection, with the foreign State whose responsibilities and rights we should share, is, in my judgment, inconsistent with such dedication to universal and neutral use, and would, moreover, entail measures for its realization beyond the scope of our national polity or present means."

Freeman Snow.

CAMBRIDGE.

STATUTORY REVISION.

IMPORTANT problems in the science of law arise to-day from the great and constant increase in the authoritative literature of the subject. In respect to case law there has been much discussion of the possibilities of abridgment by codification ; but codification has not as yet, either in England or in this country, gone far beyond the stage of discussion ; at least there has been no serious attempt on any considerable scale to make a codification which shall undertake to dispense with existing reports.

The difficulties which arise from the increase of reports are met, first, by a higher classification in the later digests, and, secondly, by the development of a class of elaborate text-books devoted to narrow heads of the law. It is often easier to-day, by the aid of the best text-books and of the highly classified new English digests, to find the decisions upon a given point from out the vast library of English reports, than to find the law on the same question in the reports of one of our States.

In spite of numberless propositions to the contrary, made through a long series of years, England has pursued, with reference to the great body of her statute law, the same course which she has followed with regard to case law ; that is to say, she has not cut across the regular flow of legislation by statutory codification. In certain subjects redrafts of existing legislation have been made ; but as to the great mass of the statutory law of England, one must either look to the unofficial compilations on different subjects, or else, by the aid of the modern statute tables and indexes, seek to ascertain for himself, from the whole course of legislation, what is the statute law upon a given subject.

The State of Michigan has provided in its constitution that "no general revision of the laws shall be made." The State of New York made a revision in 1829 of its then existing statute law ; but since that time, and in spite of a provision in the Constitution of 1846, providing for codification of both statute and common law, New York has, except in certain limited subjects, lived upon the English plan, leaving the compilation of statutes and the posting up of the Revised Statutes of 1829 to private enterprise.

In the Federal Government, however, and in nearly every State in the Union, a different practice has prevailed. While in case law the profession have, as a whole, been content to rest with improved digests and with an increasing specialization in text-books, in the matter of statute law there has been entertained a more sanguine conviction. It has been generally assumed that it is possible for a community, from time to time, to take an account of stock, so to speak, of its statute law ; to summarize, classify, and reprint it, and then, at least for the purposes of most practical occasions, to cast off the statute-books of prior date, and let them go.

"Built up its idle door,
Stretched in its last-found home, and knew the old no more."

The burden of a lengthy and ever-increasing series of statutes is, unquestionably, a great one, and efforts toward relief are most commendable. The question is : Have such efforts as have been made throughout this country for the past sixty years been in any sense successful ?

It is proper here to remark that in no other field of study has it been found possible to cut loose from history. If, now, it has really been established in this country that it is possible, from time to time, in so difficult a science as that of law, to free the present from the past ; to make the records of the past no longer vital to the understanding of the present ; if, in a word, it is possible for a highly organized, law-making community, once in ten or twenty years, to start afresh, with *tabula rasa*; to sum up and state its whole body of statute law in the pages of one book, and to pass over its earlier statutes to antiquaries, certainly a great and striking discovery has been made, not only in the science of law, but in the science of the workings of the human mind.

It is proper to clear the ground by two preliminary statements.

In the first place, it is, of course, possible to introduce bodily an entirely new system of law into a given country and to part company once and for all with the old, providing the new system is really a new one, and not an amendment to the old. In such case, whether the system introduced covers the whole field of law or only some one head, the system which it supplants cannot be looked to for interpretation, because it has no historical relation with the new system. It was possible, for instance, to introduce into Louisiana, by one brief enactment, the whole English common law of crimes in substitution for the French law of crimes. So it would be possible by statute to introduce into Scotland the existing common and statute law of England, and in that case the meaning of a modern statute would be sought by the Scotch courts in the early English, and not in the early Scotch statutes. In the second place, the writer is far from denying the value of text-books of statute law, such as Throop's Revised Statutes of New York. The reasons which lead to the use of text-books and digests of case law appear to him to point to the use of unofficial text-books, tables, and indexes of statute law; and his criticisms will be confined to authoritative statutory compilations.

Let us proceed, then, to the main inquiry; namely, what measure of success revisions have attained, and how far that success has been offset by difficulties which they have brought in.

It would seem that the theory upon which official statutory revision must proceed is, that it is possible for a legislative body at a given time to present the whole existing statutory law, in a clear and symmetrical statement which will explain itself to the reader, and will, unless in exceptional cases capable of being distinguished and known, and of which one may have fair warning, dispense with the necessity of going back to the original statutes. If this is not the theory, then a revision is nothing but an index to prior statutes; and as an index it is utterly faulty, by reason both of its statutory form and of its enormous size.

Now, nothing has been more conclusively established by the experience of this country than the fact that no statutory revision is in any sense a finality. The reports of our States are full, from beginning to end, of cases which, in construing sections of Revised Statutes, or General Statutes, or Compiled Statutes, however they may be entitled, go back to the original acts for the meaning of the language of the revision. Although such

cases are extremely common, it may be well enough to refer to a few of them for illustration ; and since the reports of any one State and the memory of every lawyer provide a sad abundance of material of this sort, the writer has not thought it necessary to attempt any geographical distribution of his few citations, but will use such cases as are at hand, in his own State, drawing his illustrations, for fairness, from all three of its revisions.

The Revised Statutes of Massachusetts, c. 64, sect. 4, provided that creditors of a person deceased might administer, in case the widow or next of kin should "neglect, without any sufficient cause, for thirty days after the death of the intestate, to take administration of his estate." This language would seem quite plain. In *Arnold v. Sabin*, 1 Cush. 525, a case arose where the widow and next of kin did neglect without cause for more than thirty days to apply for administration. They brought forward, however, St. 1817, c. 190, sect. 14, the original act, which provided that creditors might administer, but only in case the widow or next of kin should refuse or neglect to take out administration, after "*being cited before the judge of probate for that purpose ;*" and the court read this important qualification of the original act into the language of the revision.

The Public Statutes of Massachusetts, c. 126, sect. 18, give a right of action against the grantor in a deed to an assignee of the grantee, for a breach of a covenant against incumbrances, provided the incumbrance "appears of record." An action was brought under this provision for an incumbrance appearing of record, namely, for a tax-lien appearing on the records of the town in which the land lay. The defendant contended that the words of the revision were nothing but a reënactment of a similar provision in the General Statutes of 1860, based in its turn upon a statute of 1855 ; that by the context in the original act the word "record" appeared to refer only to a record in the registry of deeds, and that therefore that qualification should be read into the language of the Public Statutes ; and the court so held.¹

These cases did not involve matters of complication or intricacy ; and if a lawyer cannot trust the reading of the latest revision upon such matters as these, he cannot trust it in anything.

It is sometimes urged that while to a trained lawyer an official revision may be at least superfluous, and an unofficial compilation

¹ *Carter v. Peak*, 138 Mass. 439.

might suit his purposes quite as well, there is, nevertheless, a large class of semi-legal men for whose use must be provided a homely summary of existing statute law, roughly accurate, in a form in which they can comprehend it.

Let us look into this. That class of persons is well represented by trial justices, who very often are not lawyers, although they have a very considerable jurisdiction. In *Commonwealth v. Harris*, 8 Gray, 470, the every-day question arose, upon language of the Revised Statutes, whether a justice of the peace, having jurisdiction to try, could decline final jurisdiction and bind an offender over. It was important in such a case as this, if it is ever important, that a lay magistrate should be able to ascertain his powers and duties by reading the latest revision; but the Supreme Court, in their opinion, found it necessary to go back through a long train of statutes with reference to the powers and duties of justices of the peace, beginning with a statute of 1646, and running through statutes of 1692, 1783, 1785, 1794, and 1804, to settle the question.

The Public Statutes of Massachusetts, ch. 127, sect. 21, provide that when any testator omits to provide in his will for any of his children, they shall take the same share of his estate as if he had died intestate, unless they have been provided for by the testator in his lifetime, or unless it shall appear that the omission was intentional, and not occasioned "by any mistake or accident." A man died intestate, having, as he supposed, given a house and lot to his daughter. In fact, he had not made a good title to her. Owing to his mistake of fact, he left his daughter out of his will. She brought suit for a share of his estate, claiming that the omission in his will of a provision for her was "occasioned by" a "mistake." Her case was a hard one, and she came completely within the language of the statute. Her opponents contended, however, that the words "any mistake or accident" must be construed to mean only mistakes and accidents directly connected with the writing of the will, and not to include mistakes and accidents as a result of which the will was intentionally drawn up as it was drawn, although in a way in which it would not have been drawn but for the mistake. The court, having before them a brand-new re-statement of the whole general statute law of Massachusetts, had, on the revision theory, nothing to do but to read the revision. Instead of doing so, they

went back, making way-stations of the prior revisions of 1860 and 1836, and finally discovered the head of the stream in a Provincial statute of 1700-1701, which has the following preamble: "Whereas, through the anguish of the deceased testator, or through his solicitous intention though in health, or through the oversight of the scribe, some of the testator's children are omitted and not mentioned in the will . . ." Upon the strength of this preamble as interpreting subsequent legislation, and in accordance with prior decisions in the same direction, the court introduced a qualification into the broad words of the Public Statutes, and made them read, not "any mistake or accident," but "any mistake or accident *directly connected with the making of the will*," and so excluded the daughter.¹ If there is any one thing in Massachusetts which plain men of semi-legal training are constantly engaged in, it is the settlement of matters in probate courts, including the payment of shares to legatees or distributees, and the examination of country titles. It is not uncommon to find a will which comes within the provision of this statute, and distributions are being made and titles are being passed under such wills constantly. The writer cannot understand how a plain man engaged in legal matters is at all benefited by having before him the revision of 1882, since it is incumbent upon him to know a qualification introduced into that revision by the preamble of a statute of 1700.

Such cases as the last two cited, — and the citations could be multiplied indefinitely, — dispose utterly of the theory that laymen undertaking legal duties have in a revision a *vade mecum* which they can read and construe themselves. "Understandest thou what thou readest? How can I, except some man should guide me!"

It is sometimes urged that the general lay public have a right to have their statute law presented to them in a form capable of easy reference, in order that they may ascertain for themselves, in simple matters of daily conduct, what they can or cannot do, and that they ought not to be compelled to go to a lawyer in every little matter. What there is in this position is illustrated by *Commonwealth v. Bailey*, 13 Allen, 541. Two fishermen from Newburyport, in 1866, took, between them, eight bushels of clams, for bait, from a beach in Ipswich. They were prosecuted for violation of an apparently simple section of the General Statutes. The

¹ *Hurley v. O'Sullivan*, 137 Mass. 86.

Supreme Court, in construing the language of this section, began with the Body of Liberties of 1641, and pursued the history of the enactment in question through the Colonial laws of 1660 and 1672; considered Felt's History of Ipswich, and referred to five different Provincial statutes, to statutes of 1793, 1795, and 1796, to reenactments in the Revised Statutes of 1836, and to acts of 1838, 1841, and 1844, and so led up to the clause of the General Statutes upon which the fishermen were being prosecuted.

But the inquiry in that case went further. Granting that a fisherman had the right to take seven bushels of clams at one time, for bait, the government still claimed that these two men, having come from one vessel, could only take seven bushels between them, or what one could have taken alone. They had taken eight bushels. The statute seemed extremely plain. Nothing in it — so it read — was to be construed “to prevent *any fisherman* from taking any quantity of shell-fish which he may want for bait, not exceeding at any one time seven bushels, including their shells.” But the court, on going back to the original act, — a statute of 1799, reenacted in the revision of 1836, — and by comparing that act with a statute of 1795, interpolated into the revision, as the result of a close course of reasoning, after the words “any fisherman,” the qualification “coming alone,” and held that these two men had the right to take only seven bushels between them.

All this legislation it was necessary these men should know before they could read five or six lines of the General Statutes, which would have seemed to them, if they had read them, to speak with authority and not as the scribes.

So much for the advantage which the plain man is to derive in the guidance of his daily affairs from the perusal of a statutory codification. If a fisherman cannot read a bait statute, how can any layman read any statute?

It is no answer to the criticisms now made to say that out of the whole number of cases in any one volume of reports construing the language of a revision, only a few actually disturb or go behind its language. That only indicates, what might be conceded without injury to the argument, that in the great majority of instances, either the language of the revision is the language of the prior statutes, or that there turns out to be nothing in the history of the statute to qualify the revision. Nor does it follow from the fact that in such cases the courts do not in their opinions

discuss prior statutes, that counsel did not examine prior statutes in preparation for argument. It being once established as a principle of construction that the language of a revision is not a finality, it becomes incumbent upon counsel in every question turning upon a clause of a revision, to examine the prior legislation in order to see what the revision means. The fact, if such it is, that in the great majority of cases they find that it is not so qualified, but that the language of the revision means what it says, does not alter the fact that they have had to make the examination to ascertain this fact. It is true in most fields of inquiry that the greater part of our looking is for what we do not find. In searching a title through the records one examines a hundred conveyances, not because they in fact affect his lot, but because he cannot know until he has read them that they do not affect it. It is often not what one finds, but what one looks for, that takes time. Granting, for the sake of argument, that in the great majority of the sections and clauses of a given revision there is nothing under the surface, — the fact remains that there is no way of pointing out where the air-holes are. If it were possible to single out the weak spots in a revision and mark them with a danger-signal, the case would be different. But it is not possible; and not only can it not be told what are the weak spots, but of very few sections can it be said that important cases may not arise upon a construction of them. The law of bailments rests upon the bilging of a cask of wine. A code, like any other labor-saving invention, is to be judged, not by the weakness of every part, but by its constant liability to break down in some part. No sham construction ever gives out at every point. If a skater ventures out upon thin ice and breaks through, it is no satisfaction to him to have it pointed out that there were a great many hard places where he could not have broken through.

Thus far the writer has confined himself to pointing out weaknesses and deficiencies in statutory revision, and to the suggestion of ways in which a revision "keeps the promise to the ear, but breaks it to the heart." It is proper now to suggest some affirmative ills which follow in the train of a revision.

In the first place, it is a trap for the unwary. Persons who trust its language, whether idly or from ignorance of what lies beneath that smiling surface, are liable at any moment to drop into a pitfall.

Another and a very distinct evil brought in by statutory revision is, that while it does not relieve either a lawyer or a layman from the necessity of knowing every statute that is or ever has been passed which may throw light upon a clause in a revision, either historically or by a process of comparison, it brings in an element of legislation foreign to the natural flow of proceedings, and to be construed on different principles, so adding to the subsisting burden of going to the original enactments, the new labor of deciding whether or not, and to what extent, the revision has introduced a modification. And this presents a peculiar class of statutory questions. Sometimes the courts say that a change in language in a revision means a change of law; sometimes they say, as in *Arnold v. Sabin*, cited above, that it must not be supposed from the change in language, that a change in law was intended; and it is often impossible to establish in advance whether the courts will view a given change of expression in a revision as rhetoric or as legislation.

A third difficulty which comes from revisions, aside from the bulk which they add to the mass of our statutory law, is the duplication of that bulk in the printed commissioners' report which ordinarily precedes the enactment of a revision. The commissioners' report, when it differs, as it often does, from the original acts, or from the revision which follows, fixes another point to be observed forever in projecting a legislative curve. We have, in Massachusetts, in addition to the regular series of annual statutes, and the three revisions, three very large volumes of commissioners' reports, which we must, apparently, carry on with us to the latest futurity, since the courts construe existing statutes by them.

Another feature which revision introduces is the notes of revising commissioners, upon different sections, explaining how far the commissioners propose, by a certain change in phraseology, to change the law. It is very common for judicial opinions to refer to such notes as bearing on the construction of language of a revision. And this is not all. In a recent case (*Bent v. Hubbardston*, 138 Mass. 99) a provision of the Public Statutes of 1882 is construed in the light not only of the data above specially considered, but of the preface of the commissioners' report. This preface states in rather modest terms the aims of the commission. Partly upon the strength of this

preface, the court hold that a certain change of phraseology in the Public Statutes, consisting in the omission of two or three important lines, indicates no intention on the part of the Legislature to change the law. That is, in construing a quite plain and simple sentence in a revision of 1882, we are to examine not only all prior legislation on the subject, including revisions, and also commissioners' reports, with their notes, and the resolve under which the commissioners acted, but are to bear in mind at every moment, in reading the revision, the degree of forwardness or self-restraint on the part of the commissioners, indicated in the preface to their report.

It is assumed that all this, while it does not dispense with the examination of the line of original statutes, in some way simplifies the consideration of them.

The writer would like, if there were space, to speak of the enormous cost of revision. He would be glad to speak also of the errors which invariably result : for instances of error are numerous. He will, however, close by speaking of one evil which seems to him a great one. While a revision is in no sense a finality, and is hardly an authority, and is at best nothing but a peculiar kind of text-book, it differs from text-books proper, like Throop's Revised Statutes, or Crocker's Notes on the Public Statutes, in this : that it cannot be thrown away when a new edition appears, but, being to some extent—and nobody can know to just what extent—legislation, and not mere statement, it must be dragged along forever. It is a cardinal principle of statutory law that a statute, like a sin, is ineradicable. It may be repealed ; but an argument immediately arises, phoenix-like, upon the fact of the repeal. That is the great trouble in statute-making : that we can never shake off a statute unless, perhaps, in some cases where the subject-matter of the legislation has entirely disappeared. The courts of Massachusetts, with a revision of 1882 before them, are construing now, in every volume of reports, revisions of 1836 and 1860, as well as early Massachusetts and ancient English statutes. Text-books, with rare exceptions, we can shake off ; and in this distinction lies one great argument for unofficial revision. A private statutory text-book we can at last throw away ; an official revision, which is not much more of a finality than a text-book, clings and clings like an Old Man of the Sea.

In every community, as in the mind of every man, there run at

the same time opposite currents of opinion and belief. While the State of Massachusetts was expending a fortune in its last revision, of 1882, it was proceeding with the publication, in five large volumes, at a great cost, of the Provincial Acts, from 1692 to 1780. Those acts are being constantly referred to by the courts, and the fact was appreciated that the bar should have access to them. But the issue of these ancient originals was a striking proof of a strong eddy of conviction, that in the projected revision one would really find no rest for the sole of his foot. While such a publication of ancient enactments emphasizes the greatness of the burden resting upon us in the legislation of our ancestors, it pronounces upon our modern revisions the condemnation of the prophet: "They have healed the hurt of the daughter of my people slightly, saying, Peace, peace; when there is no peace."

H. W. Chaplin.

BOSTON.